Supreme Court, U. S.
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IN THE

Supreme Court of the United States

_____ TERM, 1979

NO. 79-207

DOUGLAS W. ALBERT, BERNARD D. JACKSON, GILBERT GONZALEZ, JESSE C. SMITH, JOHN J. DAVIS, RICHARD Y. GARCIA,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement	3
Statement of the Nature of the Case	3
Reasons for Granting the Writ	7
Question One Restated	7
Question Two Restated	9
Question Three Restated	13
Conclusion and Prayer	16
Certificate	17
Appendix	
Constitutional and Statutory Provisions Involved	A-1
Opinion and Judgment of the Court of Appeals	B-1
Indictment In Case No. 74-H-159	C-1
Defendants' Motion to Dismiss Indictment In Case No. 74-H-159	D-1
Order Dismissing Indictment In Case No. 74-H-159	E-1
Notice from United States Court of Appeals, 5th Cir. Denying Petition for Rehearing and Rehearing En Banc	F-1

TABLE OF AUTHORITIES

CASES

	Page
Beazell v. Ohio, 269 U.S. 167	8
Calder v. Bull, 3 U.S. 269 (1748)	5, 7
Davis v. United States, 417 U.S. 332 (1974)	8
Glasser v. United States, 315 U.S. 60 (1942)	3, 6, 13, 14
Ingram v. United States, 360 U.S. 672 (1959)	15
Kaufman v. United States, 394 U.S. 217 (1969)	8
United States v. Beechum, 582 F.2d 878 (5th Cir. 1978)	2, 5, 6, 7, 11,12
United States v. Carter, 516 F.2d 431 (5th Cir. 1975)	10

CASES

	Page
United States v. Goodwin, 442 F.2d 1001 (5th Cir. 1974)	9
United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973)	8
United States v. Kirk, 528 F.2d 1057 (5th Cir. 1976)	9
United States v. Malatesta, No. 77-5032 (5th Cir. 1979)	2, 7, 8, 14, 15, 16
United States v. Ring, 513 F.2d 1001 (6th Cir. 1975)	9
United States v. San Martin, 505 F.2d 918 (5th Cir. 1974)	10

MISCELLANEOUS

United States Constitution, Article I, § 9	8
Federal Rules of Evidence, 404(b)	4

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The Petitioners DOUGLAS W. ALBERT, BERNARD D. JACKSON, GILBERT GONZALEZ, JESSE C. SMITH, JOHN J. DAVIS, RICHARD Y. GARCIA, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 595 F.2d 283 (1979). It is set out in the Appendix Infra, p. B-1.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 21, 1979. Petition for Rehearing was denied on July 2, 1979. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

QUESTION ONE

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO APPLY THE BENEFITS OF *U.S. V. MALATESTA*, NO. 77-5032 WHILE APPLYING THE BURDENS OF *U.S. v. BEECHUM*, 582 F.2d 878, WHERE BOTH CASES WERE DECIDED DURING THE PENDENCY OF THIS APPEAL AND THEREBY DEPRIVED THESE PETITIONERS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AND VIOLATED THE *EX POST FACTO* PROVISION OF THE CONSTITUTION.

QUESTION TWO

DID THE CIRCUIT COURT DECISION VIOLATE THE ORDINARY RULE OF THIS COURT AND OTHER CIRCUITS REQUIRING THAT INTENT BE AT ISSUE BEFORE EVIDENCE OF AN EXTRINSIC OFFENSE MAY BE OFFERED AND ADMITTED AS PROBATIVE OF THAT ISSUE.

QUESTION THREE

DID THE CIRCUIT COURT OPINION AS TO PETITIONERS DAVIS AND GARCIA VIOLATE THE RE-ADOPTED RULE OF *GLASSER V. U.S.*, 315 U.S. 60.

STATUTORY PROVISIONS INVOLVED

STATEMENT

Petitioner Albert was sentenced to five years on Count One, one year as to Counts Two, Three and Five, to run consecutive to each other and consecutive to the sentence imposed in Count One for a total of eight years. Petitioner Jackson was sentenced to five years as to Count One, and one year as to Counts Two and Three, to run consecutive to each other and to Count One for a total of seven years. Petitioner Gonzalez was sentenced to five years as to Count One, and one year as to Counts Two, Three and Six, to run consecutive to each other and to the sentence imposed in Count One, for a total of eight years. Petitioner Smith was sentenced to five years as to Count One and one year as to Counts Two, Three and Seven, to run consecutive to each other and consecutive to the sentence imposed in Count One for a total of eight years. Petitioner Davis was sentenced to three years on Count One. Petitioner Garcia was sentenced to three years on Count One. (App. C-1 thru C-5).

This appeal followed.

STATEMENT OF THE NATURE OF THE CASE

Petitioners were charged in an eight count indictment with conspiracy to violate the civil rights of the citizens

of the United States, (18 U.S.C. § 241, depriving citizens of property without due process of law, 18 U.S.C. § 242, and Appellants Albert, Gonzalez, Smith and Davis were charged with perjury, 26 U.S.C. § 7206(1). Said indictment was filed on May 31, 1974.

Prior to arraignment the Government moved to disqualify Messrs. Moore and Hunt as defense counsel on the basis of an alleged conflict of interest. (R. 1517-1530). The trial court disqualified Messrs. Moore and Hunt. (R. 1657-1665). The Fifth Circuit Court of Appeal reversed and remanded with directions. (R. Page 3, Docket Sheet), *United States v. Garcia,* Nos. 74-3527, 74-3718 *(5th Cir. Aug. 7, 1975)*

Petitioners were arraigned and *pled not guilty on October 31, 1975.* (R. Page 3, Docket Sheet)

In March of 1976, the Petitioners, six (6) former police officers, were convicted by a jury on one (1) or more counts of an indictment charging conspiracy to deprive United States citizens of guaranteed rights, depriving persons of property without due process of law and under color of state law, and filing false income tax returns.

Petitioners appealed alleging that the trial court committed reversible error in admitting into evidnce testimony concerning alleged extrinsic criminal activity of Co-Defendant Gonzalez which allegedly occurred three (3) years prior to the date of offense charged for the limited purpose of showing intent under Federal Rules of Evidence 404(b) without any limiting instruction to the jury. Intent was never a contested issue. The other five (5) Petitioners were not accused of culpable involvement in the extrinsic scenario, but the trial court gave no

limiting instructions or directions to the jury as to the effect of the extrinsic evidence against them.

The Court of Appeals for the Fifth Circuit overruled this point of error by retroactively applying the standards recently set by *United States v. Beechum,* 582 F.2d 878 (5th Cir. 1978), which was decided and then reversed in en banc by the Fifth Circuit while the Court delayed the instant appeal. The Panel found that the trial court "could" have correctly ruled in 1976 by complying with the new 1979 (*Beechum*) rule as to admissibility of extrinsic offenses, but the requirement and necessity of extrinsic limiting jury instructions, which should have been given by the trial court, was purged by the Panel because they did not approve of those instructions proposed by trial counsel at the 1976 trial. This *Ex Post Facto* application now challenged on certiorari directly conflicts with the long standing precedents in this circuit and the Supreme Court beginning with *Calder v. Bull,* 3 U.S. 269 (1798).

Government witness Chavez testified over objection that in 1969 Co-Defendant Gonzalez was involved in a theft and sale of one (1) pound of Heroin under circumstances allegedly similar to those charged in the present offense alleged to have occurred in 1972. This extrinsic offense was the subject of Indictment No. 74-H-159 which was subsequently dismissed after it was shown that Van's Ballroom (the site at which Chavez claimed the alleged 1969 Co-Conspirators met to "cut up the pie") had been destroyed by fire on August 1, 1969 which made it impossible for the "split" to have occurred on October 20, 1969 as alleged in the extrinsic indictment. Thus the extrinsic offense was not.

(See Appendix C-1 thru C-5; D-1 thru D-5; and Appendix E)

While visiting the burdens of *Beechum* upon the Petitioners in this *Ex Post Facto* fashion the Fifth Circuit denied the Petitioners the benefit of *United States v. Malatesta,* No. 77-5032 (5th Cir. 1979), another *en banc* decision handed down during the pendency of the instant appeal, which abolished the "slight evidence rule" in this Circuit in conspiracy cases. The Government relied upon the now abandoned "slight evidence rule" against the claims of insufficiency of evidence by Appellants Davis and Garcia and the Panel's decision is contrary to *Malatesta,* which now requires substantial evidence to support the verdict. The Panel's decision conflicts with the law of the Fifth Circuit which as stated in *Malatesta,* recently, on March 12, 1979, reverted to the parameters, of *Glasser v. United States,* 315 U.S. 60 (1942) and should be reversed.

The stated *Ex Post Facto* problems notwithstanding, the Fifth Circuit incorrectly applied the facts of this case to the precedent of *Beechum* as outlined in detail in the argument herein. The Petitioners motion for rehearing was denied on July 2, 1979.

This decision should be vacated with this conviction being reversed and the cause remanded for trial where the trial court can comply with *Beechum* prospectively rather than subject the Petitioners to an *Ex Post Facto* application of *Beechum* through a post mortem of psychological indulgence requiring astral projection.

REASONS FOR GRANTING THE WRIT

QUESTION ONE (Restated)

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO APPLY THE BENEFITS OF *U.S. V. MALATESTA*, NO. 77-5032 WHILE APPLYING THE BURDENS OF *U.S. v. BEECHUM*, 582 F.2d 878, WHERE BOTH CASES WERE DECIDED DURING THE PENDENCY OF THIS APPEAL AND THEREBY DEPRIVED THESE PETITIONERS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW AND VIOLATED THE *EX POST FACTO* PROVISION OF THE CONSTITUTION.

While the case at bar was on appeal, the Fifth Circuit reversed itself en banc on two substantial points of law. On October 25, 1978 the Fifth Circuit redefined the law concerning the admissibility of extrinsic offenses. *U.S. v. Beechum,* 582 F.2d 878. Subsequently on March 12, 1979 the Fifth Circuit banished the "slight evidence rule" as applied to conspiracies. *U.S. v. Malatesta,* No. 77-5032. The Panel did not apply the benefits of *Malatesta,* supra, to Appellants Davis and Garcia but attempted to apply the burdens of *Beechum,* supra, to the detriment of all Defendants. This inconsistency denied all Petitioners due process of law and equal application of law. It would appear that the Circuit has misconnected the application of the benefits and burdens of these respective cases. That is to say, under controlling decisions of the Supreme Court, the Circuits analysis violates the prohibition against retrenching rules of evidence so as to make conviction more easy. The Circuit's reasoning falls within the gambit of *Ex Post Facto* prohibition.

Beazell v. Ohio, 269 U.S. 167; see also *U.S. v. Henson,* 486 F.2d 1292. Mr. Justice Chase noted in *Calder v. Bull,* 3 U.S. 269, what laws fell within that prohibition and included "every law that alters the legal rules of evidence, and requires less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender". The Circuits change in the law regarding the admissibility of extrinsic offenses, while the case was on appeal, altered the rules of evidence by making the Government's burden of proof less onerous and in turn sustained the conviction on less than what was required at the time of trial.

The Supreme Court held in *Davis v. U.S.,* 417 U.S. 332, that a petitioner may make a collateral attack under article 2255 where new law has been established in the Circuit since his trial and appeal even though that issue was raised in the prior direct appeal and determined against him, see also *Kaufman v. U.S.,* 394 U.S. 217. Because *Davis,* supra, held that petitioner may benefit from a change of law in his favor on collateral attack it must follow that these Defendants on direct appeal may do the same.

Furthermore, it is impermissible to burden these Petitioners with adverse rulings which occurred while their case on appeal. *U.S. Constitution, Article I, § 9.*

The two important en banc decision *U.S. v. Beechum,* supra and *U.S. v. Malatesta,* supra, were either not applied, misapplied, or applied to the detriment of these Petitioners as pointed out above without an opportunity for them to present briefs and/or arguments consistent with their respective positions. Since the current dilemma of these Petitioners is a direct product of the Fifth Circuit's subsequent *en banc* procedures only as *en banc* determination of the applicability of both new laws can establish the legal precedent upon which these Petitioners were convicted.

QUESTION TWO (Restated)

DID THE CIRCUIT COURT DECISION VIOLATE THE ORDINARY RULE OF THIS COURT AND OTHER CIRCUITS REQUIRING THAT INTENT BE AT ISSUE BEFORE EVIDENCE OF AN EXTRINSIC OFFENSE MAY BE OFFERED AND ADMITTED AS PROBATIVE OF THAT ISSUE.

The controlling rule of the Fifth Circuit as to the admissibility of evidence of an extrinsic offense as stated in *United States v. Kirk,* 528 F.2d 1057 (5th Cir. 1976) and *United States v. Goodwin,* 442 F.2d 1144 (5th Cir. 1974) is, if the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudicial effect; therefore, in this circumstance the evidence is uniformly excluded. As evidenced by the defense used in the state trial of this case the prosecution was aware that the Petitioners did not contest the issue on intent, but simply asserted that the alleged offense did not occur.

To assume that intent was in any way at issue is to overlook the distinction between offenses that require proof of intent in order to convict, (i.e. forgery, passing counterfeit money, receiving stolen property, obtaining money under false pretenses) from those offenses in which intent may be inferred from proof of the criminal act charged. *United States v. Ring,* 513 F.2d 1001 (6th Cir. 1975).

Footnote 11 of the Fifth Circuit opinion recognized that the evidence of the extrinsic offense was offered to show intent. The error in admitting the evidence of an extrinsic offense in this case against Defendant Gonzalez is compounded by the extreme prejudicial effect it had upon the other five (5) Petitioners. When we finally add to this the fact that no limiting charge was given to the jury, the prejudice becomes very great. To assume that the jury was able, without instruction, to place this evidence that is inadmissible in the first place, in the proper perspective completely disregards the complexity of the problem and natural workings of the human mind.

Whether the extrinsic offense is sufficiently similar in it's physical elements so that it's probative value is not substantially outweighed by it's undue prejudice is a matter within the sound discretion of the trial judge. *United States v. Carter,* 516 F.2d 431, 434-35 (5th Cir. 1975). This however, first requires that there actually was an extrinsic offense, and that it be convincingly proved. *United States v. San Martin,* 505 F.2d 918 (5th Cir. 1974). The Fifth Circuit incorrectly stated that the extrinsic offense occurred in 1969 or 1970. But as shown by the superseding indictment on the extrinsic offense, said offense in which Defendant Gonzales was charged supposedly culminated on October 24, 1969 at Van's Ballroom. Van's Ballroom burned down in August of that year, which means the only real evidence of the extrinsic offense was false. The superseding indictment as to the extrinsic offense was dismissed when the above fact was proved and is in all things untrue. The Fifth Circuit has bootstrapped it's opinion by stating that the case in chief and the extrinsic offense are very similar. It is better said that what a convicted perjurer Chavez

says happened is that he participated in a similar offense and that Petitioner Gonzalez was a participant but that the other Petitioners were not. The Fifth Circuit in *Beechum* said that the extrinsic offense was not of a heinous nature and that it would hardly incite the jury to an irrational decision by it's force on human emotion. The alleged extrinsic offense in this case was the theft and sale of a pound of Heroin by a police officer, whereas the offense in question involved money and Marijuana. It is inconsistent with human experience that the citizens on the jury would make no distinction between the Marijuana charge in the indictment and the Heroin claimed in the extrinsic offense.

The en banc decision in *Beechum* by the majority captures the improper application of the law of the Fifth Circuit when the rights of *Beechum* were carefully protected and assured by the trial court in it's lengthy limiting instructions. They gave extensive instructions to the jury on the limited use of extrinsic offense evidence employed to prove unlawful intent. In this decision the Court gave *no limiting* instructions as to the Petitioner Gonzalez and justified it saying that trial counsel offered a defective jury instruction. As to the other Petitioners the Circuit says the extrinsic offenses was not relevant or admissible, and there was likewise no limiting instructions. "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness of a limiting instruction". Gonzalez's participation in the 1969 offense was proffered only as to whether or not he had the requisite intent to commit the offense. This was not disputed or an issue at any rate. Therefore the extrinsic offense should not have been admitted and if it was to be admitted under

the *Beechum* theory then a careful, particularized, limited instruction should have been given and to fail to do so should be plain error.

Therefore the Circuit has misapplied the ruling of *Beechum* by allowing a perjurer to inferentially involve one of the Co-Defendants with an extrinsic offense allegedly committed three (3) years prior to the crime charged under the theory of showing intent wherein intent is not an issue. To establish a rule such as the Panel has done clearly flies in the teeth of the en banc decision in *Beechum* by saying that the trial court could have found that the proffer complies with the newly rediscovered rules of evidence of *Beechum*. To recite that the probative value of the extrinsic offense evidence was strong because the high degree of similarity between the two occurrences would establish the dangerous precedent that regardless of cross-examination or evidence to the contrary an alleged Co-Conspirator could testify as to the existence of a fabricated similar conspiracy or numerous previous conspiracies unsupported by real evidence, and even contrary to the actual facts. This would invite perjury on the part of Government witnesses testifying under a promise of immunity, or other considerations not to prosecute in return for their testimony, which would state that at some unknown time, at some unknown place, the other Co-Conspirators, or at least one of them participated in an offense in the same manner and method, in similar capacities as the Co-Defendants on trial and that the other imagined extrinsic offenses were indeed very similar because he so wrote the part. This misapplication of *Beechum* should be carefully examined by this Court to avoid the suggestion above, which must follow the rule of law established in the

Circuits opinion with absolutely no parameters of admissibility except that if it is strongly similar and the Government needs the evidence then, in that event, the probative value will outweigh the danger of undue prejudice. The Government and the Circuit cannot deny that the actual charges against Gonzalez in the indictment were dismissed and that Chavez was incorrect when he said that the "cutting of the pie" took place on October 20, 1969 because the truth is Van's Ballroom burned in August of 1969. If the Circuit is going to engage in speculation and hindsight they should reconsider their position and at the very minimum reverse this conviction with instruction that the trial court upon retrial carefully determine if intent is in issue, then they must determine whether or not the offenses were sufficiently similar by examining the physical facts of the allegations by Chavez. The Government must offer proof in demonstrating that the Defendant committed the offense. As a dismissal of the indictment against Mr. Gonzalez after finding that Van's Ballroom burned in August of 1969 is certainly inconsistent with the fact that the Defendant committed the offense. If the proof is insufficient, the Judge must exclude the evidence because it is irrelevant.

QUESTION THREE (Restated)

DID THE CIRCUIT COURT OPINION AS TO PETITIONERS DAVIS AND GARCIA VIOLATE THE RE-ADOPTED RULE OF *GLASSER V. U.S.*, 315 U.S. 60.

Petitioners Davis and Garcia contend that the Circuit decision is contrary to the holding of *U.S. v. Malatesta,*

No. 77-5032 (5th Cir. 1979) which abolished the "slight evidence rule" in the Fifth Circuit. The Panel summarily dismissed these Appellants' claim of lack of evidence to support their convictions and stated that it did not merit discussion.

In attempting to have these convictions sustained, the Government argued in it's brief that the "slight evidence rule" had been satisfied. This rule recognizes that once the existence of a conspiracy has been established only "slight evidence" is necessary to connect a particular defendant to that conspiracy. However, the "slight evidence rule" was very recently abolished in this Circuit, *U.S. v. Malatesta,* supra. The Fifth Circuit held en banc that "the slight evidence rule as applied to conspiracy cases since 1969 should not have been allowed to worm it's way into the jurisprudence of the Fifth Circuit". That Circuit has now re-adopted the forty (40) year old rule established in *Glasser v. U.S.*, 315 U.S. 60, where the Supreme Court held that the verdict of the jury is to be sustained if there is substantial evidence to support the verdict taking the view most favorable to the jury's conclusions.

Petitioners Davis and Garcia were found guilty of Count 1, conspiracy to violate the civil rights of citizens, while at the same time being found not guilty of Counts 2 and 3, the actual theft from the citizens.

A review of the record shows that there is not even slight evidence, let alone substantial evidence to support their convictions. The three (3) Government witnesses who were allegedly wiretapped, beaten and robbed made no mention of Defendants Davis or Garcia. Furthermore, in regards to Davis, the Government stipulated that he

was at Army summer camp from July 8, 1972 through July 21, 1972, (R. 990-1, 1007). The period of the alleged wiretap took place from July 2, 1972 to July 25, 1972 according to Government witness Avila. (R. 379) Zavala, another Government witness, stated all six (6) Defendants took part in physical surveillance, but that he had *never* seen any of them participate in any wiretapping (R. 622, 637-38) Government witness Fowler, who designed and assembled the wiretapping equipment allegedly used in this case, testified that he had *never* checked any wiretapping equipment to Davis. (R. 671-72) Furthermore, Davis denied any participation in the alleged offense.

Regarding Garcia, Avila testified that a "Gilbert Garcia" was in physical surveillance at the Ramada Inn but did not (and could not) testify as to any participation by Appellant Richard Garcia. (R. 379) Chavez merely identified Appellant Garcia as participating in the wiretapping made the basis of this indictment at some unknown time and place. (R. 503-04) Chavez should have been able to specify since he admitted his involvment. Government witness Fowler further exculpatated Garcia when he testified that he never checked out any wiretapping equipment to him. (R. 671-72) Furthermore, Garcia denied under oath any participation in any wiretapping or any other offense. (R. 996, 1028)

In *Ingram v. U.S.*, 360 U.S. 672, which was cited to in *Malatesta,* supra, it was noted that "a conspiracy to commit a particular substantive offense cannot exist without at least that degree of criminal intent necessary for the substantive offense itself". The jury's acquittal of Appellants Davis and Garcia on Counts 2 and 3 of the indictment indicates that the jury had at least a reason-

able doubt as to their participation in the alleged substantive offenses. There is not substantial evidence that Appellants Davis and Garcia or either of them voluntarily associated with the alleged conspiracy. On reconsideration the application of *Malatesta* must obviate the guilty findings of the jury relating to Appellants Davis and Garcia and their convictions should be reversed and dismissed for lack of sufficient evidence.

CONCLUSION AND PRAYER

For all the reasons stated above the petition for writ of certiorari should be granted and the petitioners convictions and sentences set aside.

Petitioners pray for such relief.

Respectfully submitted,

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CERTIFICATE

I certify that three (3) copies of the foregoing petition for writ of certiorari was mailed to J. A. "Tony" Canales, 515 Rusk, Houston, Texas, on this 31st day of July, 1979 and three (3) copies to the Solicitor General of the United States.

ROBERT C. HUNT

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States of America

Sec. 9 [*Powers denied Congress.*]

* * *

[3] No Bill of Attainder or ex post facto Law shall be passed.

* * *

United States Statutes

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717.)

18 U.S.C. § 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or

enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same;

* * *

26 U.S.C. § 4704

(a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

(b) *Exceptions in case of registered practitioners.*—The provisions of subsection (a) shall not apply—

(1) Prescriptions.—To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705 (c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722; and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, and name and address of the patient, serial number of prescription, and name, address, and registry number of the person issuing said prescription; or

(2) Dispensations Direct to Patients.—To the dispensing or administration or giving away of narcotic

drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart [§§ 4701-4707 of this title] of the drugs so dispensed, administered, distributed or given away. (Aug. 16, 1954, c. 736, 68A Stat. 550; Aug. 31, 1954, c. 1147, § 8, 68 Stat. 1004.)

18 U.S.C. § 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens . . .

26 U.S.C. § 7206

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penanties of perjury, and which he does not believe to be true and correct as to every material matter; or

* * *

26 U.S.C. § 7237

7237. *Violation of Laws Relating to Narcotic Drugs and to Marihuana.*

(a) Violation of law relating to opium and coca leaves and marihuana.—Whoever commits an offense or conspires to commit an offense described in part I [§§ 4701-4736 of this title], or part II [§§ 4741-4762 of this title] of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2 (c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174) [21 § 174], or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended [21 §§ 171, 173, 174, 176, 177]; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch.

2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection.

(b) Unlawful disclosure of information on returns or order forms.—Any person who shall disclose the information contained in the statements or returns required under section 4732 (b) or in the duplicate order forms required in section 4705(e), except as expressly provided in section 4773, and except for the purpose of enforcing the provisions of part I of subchapter A of chapter 39 [§§ 4701-4736 of this title], or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs, shall, on conviction, be fined or imprisoned as provided by subsection (a) of this section. (Aug. 16, 1954, c. 736, 68A Stat. 860; Jan. 20, 1955, c. 1, 69 Stat. 3.)

APPENDIX B

NOS. 76-2560, 76-4350.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Douglas W. ALBERT, Bennard D. Jackson, Gilbert Gonzalez, Jesse C. Smith, John J. Davis and Richard Y. Garcia,
Defendants-Appellants.

May 21, 1979.

Appeals from the United States District Court for the Southern District of Texas.

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

GODBOLD, Circuit Judge:

The defendants were charged in an eight-count indictment with conspiring to deprive United States citizens of guaranteed rights, 18 U.S.C. § 241, depriving persons of property without due process of law and under color of state law, 18 U.S.C. § 242, and filing false income tax returns, 26 U.S.C. § 7206(1). Each was convicted

by a jury on one or more counts.[1] All appeal. We affirm all convictions.

The facts

All defendants were members of the Narcotics Division of the Houston Texas Police Department. The evidence at trial supported the following version of the facts. In the spring and summer of 1972 defendants and others[2] participated or aided in placing and monitoring unlawful wiretaps on telephone lines to gain information about drug traffic in Houston. These wiretaps revealed that a sale of marijuana was to take place in Houston in July 1972 between Geronimo Torres, a Houston seller, and Charles Jacobs, a Michigan buyer. It was also learned that John Huston of Michigan was to transport the mari juana from Houston to Michigan.

The transfer of the marijuana took place in a motel in Houston. Jacobs gave Huston about $300 for his expenses, and Huston left the motel in a car containing the marijuana. Jacobs also gave Torres $900 as a final payment on the marijuana. After these transactions Jacobs had approximately $9,000 in cash on his person.

Jacobs and Torres remained at the motel after Huston departed. Soon thereafter witness Avila and defendant

1. All were found guilty of conspiracy. Also, Albert, Jackson, Gonzalez and Smith were found guilty of deprivation of property without due process and under color of state law, and Albert, Gonzalez and Smith were found guilty of filing false income tax returns.

2. Carlos Avila and Antonio Zavala were also indicted but pleaded guilty to other crimes and testified for the government at the trial of these defendants. Michael Chavez entered a plea of guilty in another case, was not indicted in the present case, and was a government witness. Avila, Zavala, and Chavez were all members of the Narcotics Division during the time the offenses charged took place.

Jackson appeared at the motel room of Torres and Jacobs, identified themselves as police officers and entered. A short time later defendant Albert arrived at the room.[3] Torres and Jacobs were then beaten by one or more of the officers. Avila took the $900 Torres had and later divided it with witness Chavez. Jackson seized Jacobs' cash and gave it to Albert. No report was made of the seizure of this money. It was not included on property receipts given to Jacobs and Torres, and it was never returned.

Huston was stopped shortly after leaving the motel by persons identifying themselves as Houston police officers. He too was beaten and the $300 he had was seized and has never been accounted for or returned.

After Jacobs, Torres, Huston and the confiscated marijuana had been taken to the police station, witnesses Aliva and Zavala and defendants Albert, Jackson and Gonzalez prepared a list of the officers who had participated in the investigation and how much of the stolen money from the raid each was to get.[4] The money was then divided.

These prosecutions followed.

The following alleged trial errors require discussion: (1) denial of motion for continuance, (2) denial of speedy trial, (3) admission of testimony of a prior crime of defendant Gonzalez, (4) admission of a tape recording as a prior consistent statement of a govern-

3. The evidence shows that other, unidentified officers may have come into the motel room at some time while Torres and Jacobs were being beaten and arrested and while the money was being taken.

4. Other, unidentified officers may have participated in making this list.

ment witness, (5) outside communication with the jury. Other claims of error—sequestration of the jury, lack of evidence to support convictions of defendants Garcia and Davis, and reversible cumulative error—do not merit discussion.

(1.) *Denial of continuance*

Defendants moved for a continuance based on the illness of prospective defense witness Sgt. Robert Hosford of the Houston Police Department, defendants' immediate superior.

[1-3] The denial of a continuance is within the discretion of the trial judge, *e. g., Ungar v. Sarafite,* 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *U. S. v. Sahley,* 526 F.2d 913 (CA 5, 1976); *U. S. v. Gidley,* 527 F.2d 1345 (CA 5, 1976); *U. S. v. Ruiz,* 533 F.2d 939 (CA 5, 1976), and will be disturbed on appeal only on a clear showing of abuse of discretion by the trial court, e. g., *U. S. v. Moriarity,* 497 F.2d 486 (CA 5, 1974); *U. S. v. Harper,* 505 F.2d 924 (CA 5, 1974). Whether a trial court has abused this discretion is decided on a case-by-case basis in light of the circumstances. *Ungar; McKinney v. Wainwright,* 488 F.2d 28 (CA 5, 1974); *U. S. v. Uptain,* 531 F.2d 1281 (CA 5, 1976). Of particular importance are the reasons for continuance presented to the trial court. *Ungar & Uptain.* A request for continuance should be advanced with all specificity and detail feasible under the circumstances and presented as early as possible. *Uptain.*

[4] In the present case there has been no showing of an abuse of discretion. Although Hosford suffered a stroke on December 18, 1975, the motion for continuance

was not filed until February 11, 1976, only six days before trial was set to begin. To delay what was foreseen to be, and indeed was, a long and complex trial so close to its beginning required a showing to the trial court of strong reasons. Defendants in their motion stated only that Hosford's testimony was "material and relevant" and that he was the only witness capable of presenting "material evidence." Because these were the only reasons given they took on special significance. *Ungar.* The trial court found that because of the paucity of information contained in the conclusory assertions of the motion, it was unable to determine whether Hosford's testimony would be material, whether it would be substantially favorable to defendants, whether it would be corroborative or cumulative, and whether it could be obtained through other witnesses or other sources.

The defendants made no representation concerning when Hosford would be able to testify except that he "should be available in the near future" and that he was "steadily improving."[5] The trial court found, on the basis of these statements, that it could not evaluate when Hosford would be available to testify. Thus, defendants made no sufficient showing that Hosford would be able to testify if a continuance was granted. *See Blackwell v. U. S.,* 405 F.2d 625 (CA 5, 1969). The prosecution offered to stipulate to the substance of Hosford's testimony by direct stipulation of fact and by stipulated admission of portions of Hosford's testimony in prior related proceedings. In addition, the prosecution offered to cooperate in taking Hosford's deposition. Defendants refused these offers. While defendants were not compelled

5. Appellants tell us that Hosford would have been able to testify in July, 1976, but this is with the benefit of hindsight.

to accept the offers, the possibility of these alternative sources for the testimony Hosford would have given may be taken into account in determining whether a delay was justified.

[5] The defendants review the trial record and point to testimony which, they say, demonstrates the significance of Hosford as a witness. But the trial court cannot be put in error for matters not made known to it when the motion was presented.

The court did not abuse its discretion in declining to grant a continuance.

(2.) *Speedy trial*

Defendants maintain that the indictments should have been dismissed for delays between indictment and arraignment and between arraignment and trial, violative of the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 *et seq.*, and the Rule 50(b) Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposition of Criminal Cases. The district court did not err in failing to dismiss the indictments.

The indictments were returned May 31, 1974. Defendants were arraigned October 31, 1975, and trial began February 17, 1976.

[6] Since indictment, arraignment and trial all occurred before July 1, 1976, the time limitations of the Speedy Trial Act of 1974, 18 U.S.C. § 3161(c), do not apply.[6] 18 U.S.C. § 3163(b); *U. S. v. Garza,* 547 F.2d 1234 (CA 5, 1977).

6. Defendants allege that, because they were designated as high risk defendants by the government, the interim requirements of § 3164 of the Speedy Trial Act applies to them requiring that they be tried within 180 days of July 1, 1975. However, § 3164 deals with the custodial situation of defendants awaiting trial and has no provision for dismissal of indictments if its limitations are exceeded.

The Rule 50(b) Plan in effect at the time in question required that arraignment occur within 30 days of indictment and that trial take place within 90 days of the arraignment for high risk defendants.[7]

Seventeen months elapsed between indictment and arraignment. However, most of this time was spent pursuing an interlocutory appeal to this court to determine whether defense attorneys should be disqualified for conflict of interest. It was the duty of the prosecution to call attention to the possible existence of a conflict of interest. The trial judge ruled that there was a fatal conflict, but this court reversed. *U. S. v. Garcia,* 517 F.2d 272 (CA 5, 1975). Three and one-half months passed between arraignment and trial. Trial had been set for early January 1976, but was moved to February 18 because of an earlier trial still in progress before the original trial judge and because of that judge's poor health.

[7, 8] Rule 50(b) plans are "not inflexible and noncompliance therewith does not automatically result in dismissal." *U. S. v. Maizumi,* 526 F.2d 848 (CA 5, 1976); *see also, U. S. v. Garcia,* 553 F.2d 432 (CA 5, 1977); *U. S. v. Bloom,* 538 F.2d 704 (CA 5, 1976); *U. S. v. Atkins,* 528 F.2d 1352 (CA 5, 1976); *U.S. v. Pena,* 527 F.2d 1356 (CA 5, 1976); *U.S. v. Clendening,*

7. This plan went into effect September 9, 1975, between indictment and arraignment. The previous plan had limits of 45 days between indictment and arrignment and 90 days between indictment and trial.

526 F.2d 842 (CA 5, 1976). A 50(b) plan is "not intended to impose arbitrary or impractical penalties on the system of criminal justice it seeks to expedite." *U. S. v. Rodriguez,* 497 F.2d 172 (CA 5, 1974).

[9] The delay between the end of the interlocutory appeal and arraignment was short,[8] and the delay beyond the plan limit between arraignment and trial was only 18 days. Given the complexity of this case and the multiplicity of defendants,[9] the short period by which the 50(b) plan time was extended, and the reasons for the extensions,[10] the district court was not in error in refusing to dismiss the indictment because of non-compliance with the 50(b) plan.

(3.) *Evidence of prior criminal activity*

The court allowed testimony by Chavez, an unindicted coconspirator and government witness, and formerly an officer in the Narcotics Division, *see* n.2, *supra,* concerning events that occurred in 1969 or 1970 involving defendant Gonzalez. Chavez testified that, as a result of use of an illegal wiretap, a pound of heroin was seized from a suspect. It was brought to Chavez by officers Zavala, *see* n.2, *supra,* and Collins. Chavez turned the heroin over to an informer who gave Chavez $8,000 in return. Chavez met Gonzalez, Zavala and Collins at a ballroom and "sliced the pie" with them by giving each $2,000.

8. The Fifth Circuit mandate was filed in the district court September 2, 1975, and arraignment was October 31, 1975.

9. *See U. S. v. Bloom, supra.*

10. Several cases also note that the docket for the District Court for the Southern District of Texas has been exceptionally crowded which is to be considered in determining reasonableness of delay. *E. g., Bloom, Pena, Clendening, Rodriguez.*

Chavez acknowledged that his receipt of the heroin was "theft of heroin from a narcotics suspect." (Counsel for defendants objected to Chavez's testimony on the ground that it related to an extraneous offense. The objection was overruled, and no limiting instruction was requested.

[10] We examine the admissibility of the testimony under the standards of *U. S. v. Beechum,* 582 F.2d 898 (CA5, 1978) (en banc) *cert. denied,* ____ U.S. ____, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). We conclude that it was admissible against Gonzalez under F.R.Evid. 404 (b) for the purpose of showing that in 1972 he and other police officers were involved in a scheme to deprive narcotics offenders in Houston of their property through the use of wiretaps.[11] For this purpose, the district judge could find that the evidence of the 1969 scheme was relevant under Rule 401. He could find that there was sufficient evidence for the jury to conclude that Gonzalez in fact participated in the 1969 offense. And, under Rule 403, he could find that the probative value outweighed the danger of undue prejudice to Gonzalez. In this connection we must consider the government's need for the evidence. Its case rested upon testimony of narcotics offenders whose money had been taken and who had been beaten, and of other officers involved who had pleaded guilty pursuant to plea bargains or had been convicted of committing perjury before the grand jury. The government did not have so strong a case that a case that the incremental value of Chavez's testimony was slight. The probative value of the extrinsic offense

11. Discussion at trial centered on admissibility to show "intent." But defendants were not mislead by this because the limiting instructions, requested later, included motive, intent, scheme, design and propensity.

evidence was strong because of the high degree of similarity between the two occurrencs. In both, wiretaps were used, officers of the Houston Police Department were participants, money or property was mulcted from narcotics offenders, and police officers split the "take." Finally, the two events were not too temporally remote, one in 1969 or 1970, the other in 1972.[12]

[11] Several days after the testimony was admitted defense counsel filed written requests for jury instructions. Included was an instruction limiting testimony concerning the 1969 events to the purpose of showing Gonzalez's "motive, intent, scheme and design and propensity to participate" in the conspiracy charged in the indictment, and instructing that the 1969 events were not to be considered at all with respect to the other defendants. Pretermitting the untimeliness of the request, while this charge contained correct elements the court did not err in refusing it because it was internally inconsistent and misleading. In addition to what we have already described it said: "You are not to concern yourself with the question of whether or not the defendant Gilbert Gonzalez participated in said criminal offense or is anyway guilty of the alleged sale of heroin in 1969." Gonzalez's participation in the 1969 offense was the whole point of the collateral offense matter.

[12] The defendants other than Gonzalez assert that even if Chavez's testimony was admissible against Gonzalez it was not admissible against them, and the jury should have been so instructed. We agree that evidence of Gonzalez's prior misdeeds, occurring before the

12. In *U.S. v. Kirk*, 528 F.2d 1057 (CA 5, 1976), three years was held not too remote.

charged conspiracy began, was not even "relevant" to these other defendants under Rule 401. The limiting instruction belatedly requested was flawed, as already described. Also, since the Chavez testimony only related to Gonzalez, and none of the other defendants was mentioned in connection with it or during the time frame covered by it, the contention that the jury would consider it at all with respect to the other defendants is somewhat attenuated. Also, elsewhere in his charge, the judge instructed that in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements, and that he could not be bound by the acts or declarations of other participants until it was established that a conspiracy existed and that he was one of its members. We hold that there was no reversible error as to these other defendants.

(4.) *Admission of tape recording*

[13] The trial court allowed into evidence a tape recording between government witness Chavez and a drug dealer, portions of which corroborated Chavez's trial testimony. Defendants urge that this was inadmissible hearsay. The trial court admitted the tape under Fed.R. Evid. 801(d)(1)(B)[13] as a prior consistent statement used to rehabilitate a witness who has been attacked for

13. "Statements which are not hearsay.
A statement is not hearsay if—
(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . .
(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ."

recent fabrication of his testimony or improper motivation for his testimony.

The trial court did not err. Chavez testified and underwent vigorous cross-examination. The content of the tape was consistent with his testimony at trial. There may be some doubt whether express charges of improper motive or recent fabrication were made, but the defense attorney, during his cross-examination of Chavez, implied improper motive or recent fabrication. Several times the defense brought out that it was not until an arraignment was worked out between the government and Chavez on charges against him that he agreed to testify against the defendants.

[14] Defendants also say that the tape was inadmissible because the government did not show, other than by the testimony of Chavez, that the tape was authentic and had not been tampered with.

Rule 901 of the Federal Rules of Evidence provides in part:

> (a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations.—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of witness with knowledge.—Testimony that a matter is what it is claimed to be.

* * *

> (5) Voice identification.—Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

Further, a trial judge may admit physical evidence if he is satisfied that in reasonable probability the article has not been changed in any important respect from its original condition. *E. g., U.S. v. Daughtry,* 502 F.2d 1019 (CA 5, 1974); *U.S. v. Brown,* 482 F.2d 1226 (CA 8, 1973); *Gallego v. U.S.,* 276 F.2d 914 (CA 9, 1960); Wigmore, *Evidence* 3d ed., § 437(1).[14]

[15] Here, Chavez identified the voices on the tape and stated that the conversation on the tape was the one he had conducted with the drug dealer at the time the recording was made. This testimony by Chavez meets the admissibility requirement of Rule 901. Chavez was available for and was put through cross-examination concerning his identification of the voices and the conversation on the tape. Any doubts the defendant may have raised about his identification went to the weight and not the admissibility of the tape.

(5.) *Communications with Jury*

Early in the first full day of jury deliberation, two Assistant United States Marshals made statements to

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14. Factors to be considered in making this decision include the nature of the article, the circumstances surrounding its custody, and the likelihood of others tampering with it. *U.S. v. Daughtry,* 502 F.2d 1019 (CA 5, 1974); *U.S. v. Brown,* 482 F.2d 1226 (CA 8, 1973).

members of the jury to the effect that "it shouldn't take you long to reach a verdict in this case" and "we were up early so we could get through today." Upon learning of these communications, the Marshal's Service had the foreman of the jury investigate the matter, take statements from other jurors and make a written report to the Marshal's Service. This report was given to the trial court the next day. Following the verdict a full-scale hearing was held on this incident and the trial court found that these communications had not been harmful and denied defendant's motion for new trial based on this occurrence.

[16, 17] Prejudicial private communications between jurors and third persons are, or course, prohibited. *E. g. Mattox v. U.S.*, 146 U.S. 140, 150, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *Remmer v. U.S.*, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956); *Tillman v. U.S.*, 406 F.2d 930 (CA 5, 1969). However, if, by means of a hearing or other investigation by the trial court, the private communications are shown to be harmless, a new trial is not required. *Id.* The granting of a new tiral because of outside contacts with the jury is left largely to the discretion of the trial court. *Id.; U.S. v. Khoury,* 539 F.2d 441 (CA 5, 1976).

In the present case, a complete hearing was held on the outside communications to the jury and whether this contact had been harmful to the defendants. After the hearing the trial judge decided that the defendants had not been prejudiced by the remarks to some of the jurors. According to the trial judge the reasons for this conclusion were: the remarks did not relate to the evidence and did not indicate the Marshal's view of the evidence; the remarks were made in jest; and after the statements the jury deliberated for nearly three days. The lower court

also found the actions of the Marshal's Service after learning of the incident were the result of commendable caution.

[18] Because the record indicates that this contact with the jury was not an egregious breach of the jury's time-honored and much-needed privacy and isolation and because the trial court has wide discretion in this matter and exercised its discretion only after a thorough investigation and because there were substantial reasons for the trial court's decision, we find that the trial court did not abuse its discretion in refusing to grant a new trial because of improper statements to some jurors.

Newly discovered evidence

[19] In a separate, consolidated appeal defendants ask for reversal of the district court's denial of a second motion for new trial based on newly discovered evidence. Defendants contend that witness Zavala in a statement to the Houston news media contradicted testimony he had given at trial concerning the existence of an agreement between him and the prosecution promising no prison term if he testified against defendant. The trial court found that it had disposed of this contention at a hearing on an earlier motion for new trial. The denial of a motion for new trial is within the discretion of the trial court. *E. g., Montgomery Ward v. Duncan,* 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Harris v. Whiteman,* 243 F.2d 563 (CA 5, 1957), *rev'd on other grounds* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958). This discretion was not abused.

The convictions of all defendants are AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. 74-H-159

UNITED STATES OF AMERICA

v.

ANTONIO V. ZAVALA
GILBERT GONZALEZ
DELBERT D. COLLINS

INDICTMENT

THE GRAND JURY CHARGES:

Count One

That from on or about October 1, 1969, and continuing to on or about November 1, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, ANTONIO V. ZAVALA, GILBERT GONZALEZ, and DELBERT D. COLLINS, the defendants and conspirators herein, willfully and knowingly did combine, conspire, confederate, and agree together, with each other, and with Michael E. Chavez, a conspirator, not named as a defendant herein, and with other persons to commit the following offense against the laws of the United States of America, to-wit: to receive, conceal and sell and facilitate the concealment and sale of a quantity of a narcotic drug, to-wit: Heroin, after being imported and brought into the United States,

knowing the same to have been imported and brought into the United States contrary to law and in violation of Title 21, United States Code, Section 174.

That said combination, conspiracy, confederation and agreement was substantially as follows:

That a quantity of Heroin would be seized from a narcotics trafficker.

That conspirators would fail and refuse to properly receipt for and inventory the seized Heroin and to turn the said Heroin into the Houston Police Department at Houston, Texas.

That conspirators would cause the Heroin to be sold.

That conspirators would divide the proceeds from the sale of Heroin among themselves.

That pursuant to and for the purpose of carrying out the said combination, conspiracy, confederation and agreement, and to effectuate the objects thereof, the following and other overt acts were committed within the Houston Division of the Southern District of Texas and elsewhere:

OVERT ACTS

1. That on or about October 15, 1969, a quantity of Heroin was seized by ANTONIO V. ZAVALA, in Houston, Texas, from a narcotics trafficker.

2. That on or about October 15, 1969, ANTONIO V. ZAVALA, GILBERT GONZALEZ and DELBERT D. COLLINS caused the Heroin to be delivered in Houston, Texas, to Michael E. Chavez for sale.

3. That on or about October 18, 1969, Michael E. Chavez caused the Heroin to be sold in Houston, Texas.

4. That on or about October 20, 1969, ANTONIO V. ZAVALA, GILBERT GONZALEZ, DELBERT D. COLLINS and Michael E. Chavez divided the proceeds from the sale of Heroin in Houston, Texas, among themselves.

(Violation: Title 21, United States Code, Section 174)

Count Two

That on or about October 15, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, ANTONIO V. ZAVALA, GILBERT GONZALEZ and DELBERT D. COLLINS knowingly and intentionally did receive, conceal and sell, and did knowingly and intentionally facilitate the concealment and sale of a narcotic drug after being imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law, to-wit: approximately sixteen (16) ounces of Heroin.

(Violation: Title 21, United States Code, Section 174 and Title 18, United States Code, Section 2)

Count Three

That on or about October 18, 1969, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court ANTONIO V. ZAVALA, GILBERT GONZALEZ, and DELBERT D. COLLINS did unlawfully, knowingly and willfully sell and distribute and did unlawfully, knowingly, and willfully cause to

be sold and distributed a narcotic drug, to-wit: approximately sixteen (16) ounces of Heroin, which said narcotic drug was sold, distributed and caused to be sold and distributed by the said ANTONIO V. ZAVALA, GILBERT GONZALEZ, and DELBERT D. COLLINS, not in or from the original stamped package and did not have attached thereto the appropriate tax paid stamps, as required by law.

(Violation: Title 26, United States Code, Sections 4704 and 7237 and Title 18, United States Code, Section 2)

Count Four

That on or about April 12, 1970, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, ANTONIO V. ZAVALA, defendant, a resident of Houston, Texas, did willfully and knowingly make and subscribe his Form 1040, income tax return, for the calendar year 1969, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter, in that the said Form 1040 did not disclose the fact that the defendant had received gross income from the sale of Heroin, whereas, as he then and there well knew and believed, he had received gross income from the sale of Heroin.

(Violation: Title 26, United States Code, Section 7206 (1))

Count Five

That on or about March, 1970, in the Houston Division of the Southern District of Texas, and within the juris-

diction of this Court, GILBERT GONZALEZ, defendant, a resident of Houston, Texas, did willfully and knowingly make and subscribe his Form 1040, income tax return, for the calendar year 1969, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said Form 1040 he did not believe to be true and correct as to every material matter, in that the said Form 1040 did not disclose the fact that the defendant had received gross income from the sale of Heroin, whereas, as he then and there well know and believed, he had received gross income from the sale of Heroin.

(Violation: Title 26, United States Code, Section 7206 (1))

A TRUE BILL:

_____

Foreman of the Grand Jury

ANTHONY J. P. FARRIS
United States Attorney

By:_____

RONALD J. WASKA
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

DELBERT D. COLLINS
GILBERT GONZALEZ

CRIMINAL NO. 74-H-159

Filed July 12, 1976

DEFENDANTS' MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS THAT THE PROSECUTION IS BARRED BY THE STATUTE OF LIMITATIONS UNDER TITLE 18, SECTION 3282

Come now, Defendants, Gilbert Gonzalez and Delbert D. Collins, by and through their attorney of record, and file this their Motion to Dismiss the Indictment on the Grounds that the Prosecution is Barred by the Statute of Limitations under Title 18, Section 3282 and as grounds for same would respectfully show unto the Court the following:

I.

The Defendants stand charged by indictment with the offense of possession with intent to distribute a narcotic drug, to-wit: heroin, in violation of Title 26, United States Code, Sections 4704 and 7237; Title 18, United States

Code, Section 2; and Title 21, United States Code, Section 174 in that from October 1, 1969 to November 1, 1969, that these two defendants and others had entered into a conspiracy to participate in the offense charged. It is specifically alleged that the heroin was taken on or about October 15, 1969, that it was distributed on or about October 18, 1969 and that the proceeds were subsequently split up between Gonzalez, Collins, Antonio V. Zavala and Michael Chavez on or about October 20, 1969.

In the trial of Criminal No. 74-H-158, Michael Chavez testified in essence as stated above and was emphatic and specific in that the proceeds from the sale of the heroin were divided among the co-conspirators on or about October 20, 1969 at Van's Ballroom, 2020 Kipling in Houston, Harris County, Texas. The other co-conspirator, Antonio V. Zavala, also testified that he received his money from the proceeds of the sale of the heroin at Van's Ballroom at the same address but that the Defendants, Collins and Gonzalez, were not present. Zavala's testimony also differs from Chavez in the material respect that the transaction between Chavez and Zavala did not occur in October, 1969, but moreover, occurred in late March, 1969.

III.

Chavez's testimony is untrue and physically impossible in that Van's Ballroom at the above address was completely destroyed by fire in the early morning hours of August 1, 1969. This establishes first that the charges in the indictment cannot now be supported by the evidence; secondly, that if it occurred at all, it occurred at

sometime other than alleged in the indictment and in any case that would had to have been prior to August 1, 1969.

The indictment in this cause was returned on May 31, 1974 which is clearly more than five years from the date of Zavala's recollection of the transaction between he and Chavez. The irreconcilable conflict between the alleged co-conspirators as testified in Criminal No. 74-H-158 establishes conclusively that, if in fact the allegations contained in the instant indictment are true, that they did not and could not have occurred on the dates alleged in the indictment. The indictment in this cause should be dismissed on the grounds that first if the transaction, which the Defendants herein maintain only took place between Chavez and Zavala alone occurred at all, it happened in late March, 1969, clearly outside the statutes of limitation. Secondly, the indictment should be dismissed on the grounds that the sworn testimony of the Government's witness Chavez clearly establishes, when taken in conjunction with the destruction of Van's Ballroom by the fire on August 1, 1969, conclusively, that if it was in fact a conspiracy, it had to occur prior to August 1, 1969 and thereby the Government's evidence if given the weight most favorable to the Government could not support the allegations contained in this indictment since they are clearly too far removed to substantiate an "on or about" indictment beginning on October 1, 1969.

IV.

An indictment alleging violations within the statute of limitations period cannot be supported by evidence of wrongdoing outside the statute of limitations and under such a set of circumstances the indictment is void. It is sub-

mitted that the irrefutable proof of the physical fact of the destruction of Van's Ballroom by the fire clearly establishes the Government's untenable position of being able to support the allegations of a conspiracy during the month of October, 1969. The only other evidence to support a date of the split of the funds between Chavez and Zavala for the sale of the heroin is by Zavala in that he recalls that it was a few days after the arrest of Louis Gonzalez on March 22, 1969.

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that this Honorable Court grant them a hearing in which evidence to support the allegations contained in this Motion to Dismiss may be produced and upon a hearing thereafter, they would respectfully move that this Court dismiss this indictment as void on the grounds that the prosecution thereof is barred by the statute of limitations under Title 18, Section 3282 and in the alternative that the irreconcilable conflict of the Government witnesses Zavala and Chavez in conjunction with the undeniable physical fact that the destruction of Van's Ballroom by fire on August 1, 1969 places the proof of the conspiracy against the Defendants, if any, clearly outside the confines of the allegations contained in the indictment and that the evidence, if any, would

not support a conviction hereunder and should in all things be dismissed.

Respectfully submitted,

JAMES A. MOORE
Attorney At Law, Inc.

By /s/ JAMES A. MOORE
James A. Moore
Attorney for Defendants
2010 North Loop West, Suite 125
Houston, Texas 77018
(713) 688-9581

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

DELBERT D. COLLINS
GILBERT GONZALEZ

CRIMINAL NO. 74-H-159

Filed July 12, 1976

ORDER

On the 12th day of July, 1976, came on to be heard Defendant's Motion to Dismiss the Indictment on the Grounds that the Prosecution is Barred by the Statute of Limitations under Title 18, Section 3282, and the Court, after considering same, grants said Motion and said Indictment is in all things DISMISSED.

It is further ORDERED that the Clerk of the United States District Court deliver a certified copy of this Order to the United States Marshal for the Southern District of Texas.

DONE at Houston, Texas, this the 12th day of July, 1976.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
July 2, 1979

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

CORRECTED

TO ALL PARTIES LISTED BELOW:

NOS. 76-2560 & 76-4350—U. S. A. v. DOUGLAS W. ALBERT, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ JULIE HARRISON
Deputy Clerk

cc: Mr. James A. Moore
Mr. Ray B. Martin
Mr. James R. Gough

No. 79-207

Supreme Court, U.S.
FILED
OCT 30 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

DOUGLAS W. ALBERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHERINE WINFREE
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-207

DOUGLAS W. ALBERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B15) is reported at 595 F. 2d 283.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing was denied on July 2, 1979 (Pet. App. F1). The petition for a writ of certiorari was filed on August 8, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On September 11, 1979, Mr. Justice Powell denied petitioners' belated application for an extension of time within which to file a petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the introduction into evidence of a prior similar crime by petitioner Gonzalez deprived petitioners of a fair trial.

2. Whether the evidence was sufficient to support the convictions of petitioners Davis and Garcia.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners, former members of the Houston (Texas) Police Department, were convicted of conspiring to violate the civil rights of suspects in custody, in violation of 18 U.S.C. 241 (count one). Petitioners Albert, Jackson, Gonzalez and Smith were also convicted on two counts of willfully depriving persons of their rights under color of law, in violation of 18 U.S.C. 242 (counts three and four).[2] In addition, petitioners Albert, Gonzalez, and Smith were each convicted on one count of filing false income tax returns, in violation of 26 U.S.C. 7206(1) (counts five, six, and seven, respectively). Petitioners Albert, Jackson, Gonzalez, and Smith were sentenced to consecutive terms of five years' imprisonment on count one and one year's imprisonment on each of the substantive counts on which they were convicted. Petitioners Davis and Garcia were sentenced to three years' imprisonment on count one. The court of appeals affirmed (Pet. App. B1-B15).

The evidence at trial showed that in the spring and summer of 1972, petitioners, along with other members of the Narcotics Division of the Houston Police Depart-

[2]Petitioners Davis and Garcia were acquitted on counts three and four. Davis was also acquitted on count eight, which charged him with filing false income tax returns.

ment,[3] participated in placing and monitoring unlawful wiretaps on telephone lines to gain information about drug trafficking in Houston. As a result of these wiretaps, petitioners learned in July 1972 that Geronimo Torres planned to sell a quantity of marijuana to Charles Jacobs, a buyer from Michigan. At approximately 6:00 p.m. on July 25, 1972, Torres delivered the marijuana to Jacobs at a Houston motel. Jacobs gave $900 to Torres in exchange for the marijuana[4] and $300 to John Huston, who had come to Houston with Jacobs to drive the load of marijuana back to Michigan (Tr. 49-53, 60, 64, 190, 277, 279, 291-292, 300-302, 333, 335, 339, 461-462, 505-507, 517-518).

After Huston left the motel with the marijuana, petitioners Jackson and Avila knocked on the door of the motel room, identified themselves as police officers, and demanded entry. Petitioner Albert arrived shortly thereafter.[5] The officers beat Torres and Jacobs. Avila took the $900 that Torres had received from Jacobs while petitioner Jackson seized almost $9,000 from Jacobs. Other Houston Police officers beat Huston and seized the $300 that he had received from Jacobs. The money was never returned to Torres, Jacobs, or Huston, nor was it listed on the property receipts those men received when

[3]The other officers were Carlos Avila, Antonio Zavala, and Michael Chavez. Chavez had previously pleaded guilty to perjury and was not charged in this case. Avila and Zavala were named in the indictment with petitioners, but prior to trial they pleaded guilty to a separate information charging unlawful interception of wire communications. All three testified against petitioners at trial.

[4]Jacobs had previously given Torres a $3000 downpayment on the marijuana (Tr. 47).

[5]Other unidentified officers may also have been present during the succeeding events (Pet. App. B3 n.3).

they were arrested. Instead, petitioners Albert, Jackson, Gonzalez, Davis and others prepared a list of the stolen money and the officers involved and then distributed the money to the various participants, including petitioners Davis and Garcia (Tr. 62-70, 165, 294-296, 377, 407-409, 475, 539, 578, 627-628, 646-648; Gov't Exhs. 7, 12).

In addition, Chavez testified to a similar unlawful scheme involving illegal wiretaps that had occurred between two and three years prior to the events that form the basis for this prosecution. The exploitation of those wiretaps led to the seizure of a pound of heroin from a suspect. Co-defendant Zavala and another officer brought the heroin to Chavez, who in turn sold it to an informer for $8,000. Chavez then "sliced the pie" with Zavala, petitioner Gonzalez, and the other officer, giving each participant $2,000 (Pet. App. B8).

ARGUMENT

1. Petitioners contend (Pet. 9-13) that the trial court incorrectly permitted Chavez to testify regarding petitioner Gonzalez's prior criminal act. Although other crimes evidence is "not admissible to prove [bad] character," it is admissible for any other relevant purpose including "proof of * * * intent, preparation, plan, * * * [or] identity * * *." Fed. R. Evid. 404(b); see, *e.g.*, *Andresen* v. *Maryland*, 427 U.S. 463, 483-484 (1976); *United States* v. *Benedetto*, 571 F. 2d 1246, 1248 (2d Cir. 1978). Here, as the court of appeals observed, both the challenged prior act and the primary offense charged involved exploitation of illegal wiretaps, a conspiracy among Houston policemen to deprive drug suspects of their rights and property without due process of law, and a distribution of the ill-gotten gains among the various officers (Pet. App. B10). In such circumstances, the similar act evidence was admissible under Rule 404(b) to

demonstrate Gonzalez's participation in a distinctive scheme or plan. See, *e.g.*, *United States* v. *Weidman*, 572 F. 2d 1199, 1201-1203 (7th Cir. 1978); *United States* v. *Weaver*, 565 F. 2d 129, 134 (8th Cir. 1977) ("modus operandi"); *United States* v. *Scholle*, 553 F. 2d 1109, 1120-1121 (8th Cir. 1977); *United States* v. *Fearns*, 501 F. 2d 486, 491 (7th Cir. 1974); *United States* v. *Jones*, 476 F.2d 533, 536 (D.C. Cir. 1973); *McCormick on Evidence* para. 190, at 448-449 (2d ed. 1972); 2 *Weinstein's Evidence* para. 404[09], at 404-57 to 404-66 (1979).

Moreover, Chavez's testimony was also admissible to demonstrate Gonzalez's intentional interference with drug suspects' constitutional rights. See, *e.g.*, *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978); *United States* v. *Weidman*, *supra*, 572 F.2d at 1202; *United States* v. *Adcock*, 558 F.2d 397, 401-402 (8th Cir.), cert. denied, 434 U.S. 921 (1977); *United States* v. *Scholle*, *supra*. Petitioners suggest (Pet. 9, 12) that although intent is an element of both 18 U.S.C. 241 and 242, the issue of intent was not really contested. However, petitioners "did not affirmatively take the issue of intent out of the case." *United States* v. *Williams*, *supra*, 577 F.2d at 191; see *United States* v. *Weidman*, *supra*, 572 F.2d at 1202. Accordingly, the government was entitled to introduce highly probative evidence regarding Gonzalez's knowledge of and intentional participation in a scheme to deprive persons of their civil rights, particularly since both Sections 241 and 242 are specific intent crimes. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *Screws* v. *United States*, 325 U.S. 91, 103 (1945). See also *United States* v. *Weidman*, *supra*.[6]

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[6]There is thus no conflict between this case and *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975). In *Ring* the court concluded that the other crimes evidence was not admissible to show intent in that case because intent was not contested. The Sixth Circuit observed,

Nor is there any merit to petitioners' claim that the prejudicial effect of the other crimes evidence substantially outweighed its probative value. See Fed. R. Evid. 403. As petitioners recognize (Pet. 10), the trial judge has broad discretion in admitting probative other crimes evidence. See *United States* v. *Williams*, *supra*, 577 F. 2d at 193; *United States* v. *Weaver*, 565 F.2d 129, 134 (8th Cir. 1977); *United States* v. *Fairchild*, 526 F.2d 185, 189 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976). Petitioners nonetheless suggest that Chavez's testimony lacked probative value because an indictment based on the occurrences constituting the similar act evidence had previously been dismissed. That dismissal, however, was unrelated to Gonzalez's guilt or innocence (Pet. App. E1),[7] and the admissibility of other crimes evidence does not depend on the existence of a conviction. See, *e.g.*, *Smith* v. *Wainwright*, 568 F.2d 662 (5th Cir. 1978) (acquittal); *United States* v. *Juarez*, 561 F.2d 65, 70 (7th Cir. 1977) (dismissal of indictment); *United States* v. *Rocha*, 553 F.2d 615 (9th Cir. 1977) (acquittal); *United States* v. *Jones*, *supra*, 476 F.2d at 537 n.3. The court of appeals correctly found that "[t]he probative value of the

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however, that certain crimes by their nature always present the issue of intent. *Id.* at 1007-1008. Specific intent crimes fall into that category. In any event, the evidence at issue here was admissible to demonstrate a distinctive plan or scheme as well as intent.

[7]The indictment, which was based on Chavez's information, alleged that the money had been divided in Van's Ballroom in October 1969. Subsequently, Zavala began to cooperate with the authorities and he stated that the division of proceeds had occurred in February or March 1969. Zavala proved to be correct, as the government later discovered that Van's had burned down in August 1969. The district court thereafter dismissed the indictment as time barred (Pet. App. E1). Thus, contrary to petitioners' intimations, the dismissal related to *when*, rather than *whether*, the offense occurred.

extrinsic offense evidence was strong because of the high degree of similarity between the two occurrences" (Pet. App. B9-B10).[8]

Finally, petitioners argue (Pet. 10-11) that the district court erred in failing to instruct the jurors concerning the limited admissibility of the other crimes evidence. Petitioners assert that the court should have informed the jurors that such evidence was admissible as to Gonzalez only and solely with regard to the question of intent.[9] But petitioners failed to request such instructions at the time that Chavez's testimony was admitted, see Fed. R. Evid. 105,[10] and the trial court's failure to instruct the jury *sua sponte* was not plain error (Pet. App. B11). See, *e.g.*, *United States* v. *Conley*, 523 F.2d 650, 654 n. 7 (8th Cir.

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[8]Petitioners also erroneously claim (Pet. 7) that the court of appeals' application of the *en banc* decision in *United Stares* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, No. 78-5774 (Feb. 21, 1979), "falls within the gambit [sic] of *Ex Post Facto* prohibition" (Pet. 7). In *Beechum*, the Fifth Circuit interpreted Fed. R. Evid. 404(b) as abrogating a prior decision regarding the standard for determining whether a similar act sufficiently demonstrates the defendant's involvement in the prior crime. A change in the rules governing the admissibility of particular kinds of evidence, rather than the quantum of evidence required to convict, is not an ex post facto law, because it is not a law "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available acording to law at the time when the act was committed * * *." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925).

[9]In fact, the evidence was also relevant to show a distinctive plan or scheme involving Gonzalez. See page 5, *supra*.

[10]Rule 105 provides (emphasis supplied):

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.

1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966). Moreover, although the district court correctly rejected petitioners' belated request to charge the jury on this issue "because it was internally inconsistent and misleading" (Pet. App. B10),[11] the court did tell the jurors to give individual consideration to the evidence against each defendant (Pet. App. B11).

2. Petitioners Davis and Garcia contend (Pet. 13-16) that there was insufficient evidence to support their conspiracy convictions. Avila and Chavez testified, however, that Davis and Garcia were involved in the illegal monitoring of telephone calls and the surveillance of the various participants in the Torres drug transaction (Tr. 291-292, 379, 460-462, 470-471, 505-507, 517-518). Moreover, at least Davis (and possibly Garcia) attended a meeting to discuss the division of the stolen money, and both Davis and Garcia received a share of that money (Tr. 295, 377, 408-409, 475, 578). In short, there was substantial evidence of Davis's and Garcia's knowing and

[11]Several days after Chavez testified, petitioners asked the court to instruct the jury "not to concern [itself] with the question of whether or not * * * Gonzalez participated in said criminal offense or is anyway guilty of the alleged sale of heroin in 1969" (Pet. App. B10). But, as the court of appeals stated, "Gonzalez's participation in the 1969 offense was the whole point of the collateral offense matter" (*ibid.*). In such circumstances, the district court properly refused the proposed instruction even if other portions of that requested charge were accurate. See *United States* v. *Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Fellabaum*, 408 F.2d 220, 228 (7th Cir.), cert. denied, 396 U.S. 818 (1969).

purposeful participation in the conspiracy.[12] Further review of this fact-bound question is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHERINE WINFREE
Attorney

OCTOBER 1979

[12]Petitioners' argument that the court of appeals failed to apply the "substantial evidence" test adopted by the *en banc* court of appeals in *United States* v. *Malatesta*, 590 F.2d 1379 (5th Cir. 1979), cert. denied, Nos. 78-6478, 78-6487, 78-6509, 78-6511 and 78-6512 (Oct. 1, 1979), is without merit. Prior to *Malatesta*, which was decided while this case was on appeal, the Fifth Circuit applied the so-called "sight evidence test" in reviewing whether the evidence connected a particular defendant to an established conspiracy. See *United States* v. *Malatesta*, *supra*, 590 F.2d at 1381. Petitioners suggest that because the government's brief in the court of appeals relied on the slight evidence test, the court of appeals' dismissal of their sufficiency claim without discussion (Pet. App. B4) shows that the court of appeals applied the slight evidence test. Nothing in the record, however, suggests that the court of appeals did not apply the standards established in *Malatesta*, and in any event there is substantial evidence supporting petitioners' convictions.

DOJ-1979-10